immoral, fraudulent, or otherwise improper purpose,[17] is now uncontested. The reasoning is that the post office, as an agency created by Congress, and under its sole control, may with entire propriety be closed to anyone seeking to use it for an improper purpose; otherwise Congress, through furnishing this agency, would be rendering affirmative aid in the perpetration of the scheme. Now it is quite true that the agencies of interstate commerce, unlike the post office, are not the direct creatures of Congress.[18] But over interstate commerce Congress has exclusive jurisdiction. Except in matters of local interest not requiring uniformity, the states may not act even in the absence of any legislation by Congress.[19] Thus a state has no power of itself to exclude liquor from interstate commerce within its borders.[20] Must Congress, then, possessing sole control over interstate commerce, allow that commerce to be used for the furthering of all sorts of injurious schemes? There is a certain rough analogy to the reasoning pursued by equity in refusing its aid to a plaintiff coming into court with unclean hands. The underlying principle is that an instrumentality created or controlled by the state ought not to be allowed to be used by any person to attain for his own benefit an end injurious to the community.[21] Not only is it constitutional, then, to look beyond the intrinsic qualities of the commodity offered for shipment, but to do otherwise would be to lose sight of the fact that commerce is but a means whereby various human ends are achieved. Any regulation that is completely intelligent should scrutinize not only the immediate subjects and agencies of commerce, but also the changes which are being wrought in the community through the use of this commerce. If this be kept in mind such regulations will not appear as perverted uses of the commerce power.

THE TERMINATION BY A SURETY OF HIS LIABILITY ON A FIDELITY BOND. — In the law of suretyship or guaranty the question frequently arises as to the effect to be given to a notice by the surety that he will no longer remain liable. The problem is squarely presented in cases where the surety or guarantor is bound for the faithful performance by an

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[17] *Ex parte* Jackson, 96 U. S. 727; *In re* Rapier, 143 U. S. 110.

[18] As to whether the right to engage in interstate commerce is conferred by the state or the federal government, see E. P. Prentice, "The Origin of the Right to Engage in Interstate Commerce," 17 HARV. L. REV. 20.

[19] Cooley *v.* Board of Wardens, etc., 12 How. (U. S.) 299.

[20] Leisy *v.* Hardin, 135 U. S. 100.

[21] It has been attempted to draw a distinction between the child labor product on the one hand and the lottery ticket, pure foods, and "movie" films on the other. In the latter, it is argued, the injury is not done until the goods reach the consumer, therefore interstate commerce participated in causing the injury. But in the former, since the injury is done to the producer, transportation causes no further injury, and therefore a prohibition is improper. See 2 WILLOUGHBY, CONSTITUTIONAL LAW, 739. Henry Hull, "The Federal Child Labor Law," 31 POL. SCI. QUART. 519, 524. The fallacy of this view, however, is its failure to recognize that unless the child-labor product were able to reach its market through interstate commerce, its production could not be continuous. The power to regulate should not turn on the temporal accident of transportation succeeding the injury instead of preceding it.

employee or agent of his contract to his employer or principal. If one wishes to generalize at the expense of discrimination, one may state the general law to be that notice of withdrawal given by the surety to the employer ends the surety's liability, if, and only if, there has been dishonesty on the part of the employee.[1] A recent Vermont case decides that, even if there has been no dishonesty or even no misconduct on the part of the employee, yet notice will end the surety's liability after a reasonable time. *Ricketson* v. *Nizolte*, 98 Atl. 801.[2] The reasons given in this and other cases lack uniformity, and therefore frequently soundness. For example, courts sometimes say that notice will end the liability of a guarantor but not that of a surety. This distinction is often merely arbitrary and at the most represents an idea which can be more clearly expressed in other words.[3] In view of this unsettled state of the law the problem invites analysis.

If the surety [4] has made merely a continuing offer to the employer to be accepted by the continuance of the employment, the surety could, of course, at any time withdraw his offer as to future employment. But, if there is independent consideration given to the surety or if his promise is under seal, the surety may not escape liability on this ground.[5] If, however, there is a contract, the application of another elementary principle, that of reasonable construction, will also help to decide many cases. It often happens that no definite time is expressed for the duration of the suretyship contract. If there is a definite term for the employment, this may fix the term of the suretyship.[6] Or it may be fixed by the amount of consideration given the surety. On the other hand, there may be no such circumstances. In that case it seems hardly probable that the surety intended to bind himself for the life of the employee. It may be very reasonable to construe the contract as intended to last until the surety revokes it,[7] or to be ended by the most serious of defaults by the employee, to wit, his dishonesty.[8]

However, where it is established that there is a contract and that it extends for a definite time, if the surety has the right to end his liability,

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[1] Notice given by the surety after the dishonesty of the employee was held to give a defense in the following cases: Phillips *v.* Foxall, L. R. 7 Q. B. 666; Emery *v.* Baltz, 94 N. Y. 408; Roberts *v.* Donovan, 70 Cal. 108, 9 Pac. 180. See Conn. Mutual Life Ins. Co. *v.* Scott, 81 Ky. 540, 544; La Rose *v.* Logansport Nat. Bank, 102 Ind. 332, 343, 1 N. E. 805, 811. Where there had been no dishonesty, death of the surety or express revocation by him, notice was held in the following cases not to end his liability: Lloyd's *v.* Harper, 16 Ch. D. 290; Shackamaxon Bank *v.* Yard, 150 Pa. 351, 24 Atl. 635. See Saint *v.* Wheeler & Wilson Mfg. Co., 95 Ala. 362, 371, 10 So. 539, 541. *Cf.* Rapp *v.* Phoenix Ins. Co., 113 Ill. 390. See *contra*, La Rose *v.* Logansport Nat. Bank, 102 Ind. 332.

[2] For a fuller statement of the facts, see RECENT CASES, p. 526.

[3] Thus in Saint *v.* Wheeler & Wilson Mfg. Co., *supra*, "guaranty" as used means an offer to a contract which can be revoked, while "surety contract" means a completed contract which cannot be revoked.

[4] In this discussion "surety" will be used in place of "guarantor" or "surety" or "prospective surety."

[5] This distinction was expressly recognized in Saint *v.* Wheeler & Wilson Mfg. Co., *supra*.

[6] See Lloyd's *v.* Harper, 16 Ch. D. 290.

[7] Phillips *v.* Foxall, *supra*, seems to have been decided on this ground.

[8] This construction was rejected in Shackamaxon Bank *v.* Yard, *supra*.

he must get it on some equitable[9] ground. "Equity abhors a forfeiture."[10] Equity's most direct way of enforcing this principle is by frankly varying the terms on which parties have contracted. Thus it declares a penalty good only for actual damages, and it gives the mortgagor an equity of redemption. In the suretyship contract the liability which the surety *may* incur is always greatly in excess of any consideration which the surety may receive. Yet, in view of the business sanction for this form of insurance, such a contract, in itself, certainly does not fall within the rule against forfeitures. Furthermore, in case the employer were bound by contract with the employee, it would be unjust to deprive him of his suretyship. Where, however, there has been dishonesty by the employee, there is so much chance of such a large liability falling on the surety that denying him relief against the strict terms of the contract may indeed be the enforcement of a "forfeiture." There is the additional consideration that to require the employer to discharge the dishonest employee is only to require him to exercise a right which he has and which it is natural to exercise. Consequently, there would seem little reason why equity should not read into the suretyship contract the condition that, on the dishonesty of the employee, the surety should be able to terminate the contract. It might well be that the surety, as a condition to his right, should be required to pay the employer the value of a suretyship contract for an ordinary employee during the remainder of the term.

This is the most honest method by which equity could relieve the surety. It is, however, perhaps less likely to find favor with courts than the extension of two better recognized equitable principles. One such principle is found in the rule that after a repudiation by one party to a contract the other may recover only the damages which he could not reasonably have avoided.[11] In the suretyship case, where the employee has been dishonest and the surety has given notice that he will not go on, it may be urged that the employer can recover no damages which he could have avoided by discharging the employee. But, in order not to deprive himself of a secured employee, which he is certainly under no duty to do, he must get a new employee and a surety for him. The rule of damages probably does not require a party to take this much trouble to reduce damages.[12] Consequently, if this rule is to solve the suretyship problem it must be by an extension of it beyond its normal scope.

Another equitable principle, applicable only to suretyship law, is that a surety is released when there has been certain inequitable conduct on the part of the principal. It may be contended that in the case under consideration it is inequitable for the employer to refuse to discharge the dishonest employee, and therefore the surety should be released.[13] In the first place this may be objectionable because it would allow the

[9] In this discussion "equitable" will be used to include those principles equitable in their origin or nature as well as those administered in a court of equity.

[10] For a discussion of this well-known principle, see 1 POMEROY, EQUITY JUR., §§ 434, 450.

[11] For a discussion of this well-known principle, see 1 SEDGWICK, DAMAGES, 9 ed., § 205.

[12] The limits of the rule are set forth in general in 1 SEDGWICK, DAMAGES, 9 ed., § 221, 221 *a*.

[13] A release was given on this ground in Emery *v.* Baltz, *supra*. See Rapp *v.* Phoenix Ins. Co., *supra*.

employer no damages for the value of the rest of the suretyship contract. But a much more cogent objection is that the rule of inequitable conduct has never been held to require any affirmative action by the principal.

These doctrines of limiting damages and of a defence from inequitable conduct are only examples of equitable relief against the express terms of a contract. Since, as we have seen, release of the surety falls within the established limits of neither doctrine, is it not better, if the surety is to be released, to let it be by frankly recognizing a new application of the broader principle of equitable variation of the contract?

NEUTRAL SHIPS AND CONTRABAND CARGOES: HAS A CHANGE IN INTERNATIONAL LAW BEEN EFFECTED? — The law of nations has been changed, in respect to condemnation by a belligerent of neutral vessels engaged in carrying contraband, according to two recent decisions of the Admiralty Division of the High Court of Justice, sitting in Prize.[1] Since the Napoleonic wars at least[2] Great Britain has consistently held the mere carriage of contraband, uncoupled with evidence of knowledge by the shipowner of the character of the cargo, to be insufficient to subject the carrying ship to confiscation.[3] This view was taken also by the United States[4]

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[1] The Hakan and The Maricaibo, [1916] P. 266.

[2] This rule was definitely adopted by the decisions of Lord Stowell, then Sir William Scott, in 1798 and 1799. The Sarah Christina, 1 C. Rob. 237, 242; The Mercurius, 1 C. Rob. 288. See also The Staadt Embden, 1 C. Rob. 26, 30; The Ringende Jacob, 1 C. Rob. 89, 90; The Neutralitet, 3 C. Rob. 295. In The Ringende Jacob it was said: "I do not know that under the present practice of the law of nations a contraband cargo can affect the ship. . . . By the ancient law of Europe such a consequence would have ensued; nor can it be said that such a penalty was unjust, or not supported by the general analogies of law, for the owner of the ship has engaged it in an unlawful commerce. But in the modern practice of the Courts of Admiralty of this country, and I believe of other nations also, a milder rule has been adopted, and the carrying of contraband articles is attended only with the loss of freight and expences; except where the ship belongs to the owner of the contraband cargo, or where the simple misconduct of carrying a contraband cargo, has been connected with other malignant and aggravating circumstances."

Bynkershoek and older writers had supported the more stringent rule, which, it will be observed, Lord Stowell held still defensible.

[3] See 5 CALVO, LE DROIT INTERNATIONAL THÉORIQUE ET PRACTIQUE, 5 ed., §§ 2776, 2777; HALL, INTERNATIONAL LAW, 6 ed., 666; MOSELEY, WHAT IS CONTRABAND AND WHAT IS NOT, 55; TUDOR, CAS. MERCANTILE AND MARITIME LAW, 3 ed., 986, 991–92; 2 WESTLAKE, INTERNATIONAL LAW, 2 ed., 291.

[4] 7 MOORE, DIGEST OF INTERNATIONAL LAW, § 1263. *Cf.* The Commercen, 1 Wheat. (U. S.) 382. See Chase, C. J., in The Bermuda, 3 Wall. (U. S.) 514, 555 *et seq.*: This "indulgent rule" is "a great but very proper relaxation of the ancient rule, which condemned the vessel carrying contraband, as well as the cargo. But it is founded on the presumption that the contraband shipment was made without the consent of the owner given in fraud of belligerent rights, or at least, without intent on his part to take hostile part against the country of the captors; and it must be recognized and enforced in all cases where that presumption is not repelled by proof. The rule requires good faith. . . ."

In The Hakan the court attaches an importance perhaps undue to its interpretation (which is not very exact) of the United States Naval War Code of 1900, and to the later views of Rear-Admiral Stockton. *Cf.* WILSON, DRAFT NO. 1 FOR PROVISIONAL INSTRUCTIONS FOR THE NAVY, DEFINING . . . CONTRABAND OF WAR, NAVAL WAR COLLEGE, 1913. It should be observed that neither Rear-Admiral Stockton, nor any